



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-03-1

### Question

May a District Court probation officer accept statutory fees for providing services as a municipally appointed constable?

### Answer

A probation officer may receive statutory fees (compensation) from a party other than the Commonwealth for services rendered as a constable in relation to litigation matters involving only non-state parties. A probation officer may not receive compensation as a constable for services rendered in connection with criminal proceedings or proceedings before a state court or agency where the Commonwealth or a state agency is a party or has a direct and substantial interest. Moreover, he may not receive compensation derived from a contract with the Commonwealth or a state agency, except under limited circumstances described below.

### Facts

This opinion is rendered at the request of a probation officer in a district court. The officer would also like to serve as a municipally appointed constable. He would not conduct constable business during his probation officer working hours, and would not execute any arrests at any time. His sole function then would be serving court documents – such as complaints, subpoenas and notices – for private attorneys after his probation officer working hours and on weekends.

### Discussion

Probation officers are state employees<sup>1</sup> for purposes of the conflict-of-interest law. Constables are municipal employees<sup>2</sup> for the purposes of the conflict-of-interest law.<sup>3</sup> This opinion addresses in depth the issues under G.L. c. 268A, §§ 4 and 7 raised when probation officers serve as constables, and notes issues raised under G.L. c. 268A, §§ 6, 17, 19 and 23 as well.<sup>4</sup>

### Section 4

Section 4(a) prohibits a state employee from “otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receiv[ing] or request[ing] compensation from anyone other than the Commonwealth or a state agency, in relation to any particular matter<sup>5</sup> in which the Commonwealth or a state agency is a party or has

a direct and substantial interest.”<sup>6</sup> Constables are compensated according to a statutory fee schedule for providing service of process.

Section 4 is based on the principle that “public employees should be loyal to the state, and where their loyalty to the state conflicts with their loyalty to a private party or employer, the state's interest must win out.”<sup>7</sup> In discussing § 17(a), the municipal counterpart to § 4(a), the Commission has stated that the section “does not require a showing of any attempt to influence – by action or inaction – official decisions. What is required is merely a showing of an economic benefit received by the employee for services rendered to the private interests when his sole loyalty should be to the public interest.”<sup>8</sup> The purpose of the section – ensuring a public employee’s undivided loyalty – guides the Commission’s analysis.<sup>9</sup>

Under § 4(a), within the context of litigation matters, the Commission has found that the Commonwealth is a party to, and has a direct and substantial interest in all criminal matters and in all civil matters where the Commonwealth or a state agency is named as a party.<sup>10</sup> Thus, full-time state employees may not receive compensation from private clients in particular matters that “bring the financial interest of the state into play” and in regulatory or adjudicatory proceedings in which the state is a party.<sup>11</sup>

Next we consider whether a constable’s compensation for serving process would be “in relation to” a lawsuit maintained by one for whom the constable served process, and thus in violation of § 4(a). The word “related” is defined in *Webster’s Third New International Dictionary* (1993) as meaning “having relationship: connected by reason of an established or discoverable relation.” Service of process is not just “connected” to the prosecution of a lawsuit, it is *integrally* connected to the prosecution of the suit. Absent service on parties, a case cannot go forward. Accordingly, we conclude that a constable’s service of process is “in relation to” the suit being prosecuted by the party for whom the constable serves process.

Because neither the Commonwealth nor a state agency has a direct and substantial interest in litigation matters involving only private parties, a constable may, while also a state employee, receive compensation from a party other than the Commonwealth for his services as a constable in such cases. A constable may *not*, however, receive compensation from a party other than the Commonwealth or a state agency in connection with *any* matter in which the Commonwealth or a state agency is a party, such as a criminal proceeding. Nor may a constable receive compensation in connection with any proceeding before a state court or agency where the Commonwealth or a state agency is a party or has a direct and substantial interest. For example, § 4 would prohibit a constable from being compensated by anyone other than the Commonwealth or a state agency for serving process in a child custody matter involving the Department of Social Services, a personal injury case where the state is a party or a workers compensation case involving an injured state employee.

Section 4 contains several exemptions to the prohibition against receiving compensation from non-state parties in relation to matters in which the Commonwealth

or a state agency is a party or has a direct and substantial interest. Two exemptions are relevant to our discussion. One is included in the language of the § 4(a). The section permits state employees to receive compensation that would be barred under § 4(a) when such compensation is “otherwise... provided by law<sup>12</sup> for the proper discharge of official duties.” The other relevant exemption provides that § 4 “shall not prohibit a state employee from holding an elective or appointive office in a city, town or district, nor in any way prohibit such an employee from performing the duties of or receiving the compensation provided for such office. No such elected or appointed official may vote or act on any matter which is within the purview of the agency by which he is employed or over which such employee has official responsibility.” This second exemption is commonly referred to as the “municipal exemption.”

***“[O]therwise...provided by law for the proper discharge of official duties.”***

The Commission, in EC-COI-94-4, indicated that since constable fees were provided for by law, this statutory language permitted a court employee who also served as a municipal constable to accept fees for service of process in litigation in which the Commonwealth or a state agency was a party or had a direct and substantial interest. We take this opportunity to reconsider that opinion.

In interpreting this statutory language, we are guided by the legislative purpose of § 4(a).<sup>13</sup> We believe that reading the exception to apply to compensation for state employees discharging their official duties *as state employees* effectuates the purpose of the statute, namely to ensure an employee’s undivided loyalty to the Commonwealth. If a constable who is also a state employee may accept statutory fees from non-state parties for private matters in which the Commonwealth or a state agency has an interest or is a party, his loyalties will be divided. This concern does not develop where a law permits state employees to be compensated by a non-state party for doing his state job. In such a case, the employee’s sole loyalty remains with the Commonwealth.

Furthermore, a rule of statutory construction states that a “limited or restrictive clause contained in [a] statute is generally construed to refer to and limit and restrict [the] immediately preceding clause or the last antecedent.”<sup>14</sup> Another way to state this rule is that “words are to be applied to the subjects that seem most properly related by context and applicability.”<sup>15</sup> Applying this canon of construction to § 4(a) would bind the “otherwise provided by law” language to the language immediately preceding it in the statute, to wit, that “[n]o state employee shall otherwise...” In other words, the only position named in the section that “official duties” can modify is the state employee position. There is no other public position mentioned in § 4(a).

In addition, if compensation for any and all official duties as a municipal or county employee were permissible under § 4(a), then the municipal exemption, which permits compensation for municipal officials under some circumstances under § 4, would be rendered superfluous. “It is a common tenet of statutory construction that, wherever possible, no provision of a legislative enactment should be treated as superfluous.”<sup>16</sup> Insofar as compensation for municipal officials is provided for by municipal ordinance or

bylaw, the reading of “otherwise provided by law” in EC-COI-94-4 would exempt such compensation from § 4(a), making the municipal exemption unnecessary.

Accordingly, based on its analysis of § 4(a) using long-standing traditions of statutory construction, the Commission concludes that the legislature intended, in drafting § 4(a), to allow state employees to collect private compensation provided by law for the proper discharge of their official duties *as state employees*. A probation officer is not required, as part of his official duties, to serve as a constable or to serve process. Therefore, a constable’s compensation, for service of process, though statutorily provided for, is not exempted from § 4(a)’s bar to state employees receipt of compensation in relation to particular matters in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

We recognize that our current reasoning is not consistent with the interpretation of “otherwise than provided by law” in EC-COI-94-4. To the limited extent EC-COI-94-4 is inconsistent with the opinion we announce today, we reverse EC-COI-94-4.<sup>17</sup>

### ***The municipal exemption***

The other exemption applicable to a state employee who is also serving in a municipal position, such as an appointed constable, is the municipal exemption, printed above. Under the exemption, a state employee who is also a constable may accept a fee for serving process even if that fee is in connection with a particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest so long as that compensation is not for work “within the purview” of the state agency that employs him. We turn then to the questions of what agency employs district court probation officers, and whether service of process is within the purview of that agency.

Under G.L. c. 276, § 83, a probation officer may be assigned by the Chief Justice for Administration and Management to “the several sessions of the trial court as he deems necessary.” As the Commission stated in EC-COI-94-4, “[s]ince the CJAM is the administrative head of the entire Trial Court and court officers are employees of the CJAM, court officers are employed by the Trial Court rather than the department to which they have been assigned.” Accordingly, the agency that employs a probation officer is not the department to which he is assigned, but the entirety of the Trial Court. We turn next to whether service of process is “within the purview” of the Trial Court.

Purview is defined in *Webster’s Third New International Dictionary* (1993) as meaning “range or limit of authority, competence, responsibility, concern or intention.” The Commission has found that the term purview includes “any matter which is regulated, reviewed, or supervised by the state agency in question.”<sup>18</sup> Applying this rule in EC-COI-93-12 the Commission held that an aide to the Governor could not act on “any matter which involve[d] the Executive Branch of the State Government,” since the entirety of the executive branch was under the Governor’s purview.

Our past opinions lead us to conclude that the service of process is within the purview of the Trial Court, i.e., regulated, reviewed or supervised by the trial court. We start by noting that disputes over whether service has been perfected are necessarily addressed by the Trial Court. Further, process service is extensively regulated and supervised by the Trial Court. Under Mass. R. Civ. P. Rule 4(b), summonses served “shall bear the signature or facsimile signature of the clerk,” and “be under the seal of court.” Rule 4(c) provides that service of process can be made by “some person specially appointed by the court for that purpose. Rule 4(f) provides that the person serving the process shall make proof of service thereof in writing *to the court.*” (emphasis added.) Rule 4(g) provides that “[a]t any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended.” Rule 4(j) provides that, absent a showing of good cause, the court shall dismiss a case when service is not made on the defendant within 90 days of the filing of the complaint. Based on these rules of procedure, the Commission finds that service of process is within the purview of the Trial Court. Accordingly, a constable’s work serving papers in matters in which the state or an agency is a party, or has a direct and substantial interest, would be “within the purview of his agency” and therefore not exempted under the municipal exemption. In conclusion, § 4 does not contain any exemption that would allow a probation officer who is also a constable to be compensated for serving process in a matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.

### Section 7

Section 7 of the conflict of interest law prohibits a state employee from having a direct or indirect financial interest in a state contract unless a statutory exemption applies. Because a probation officer is a state employee, issues will arise under § 7 if his fee as a constable were derived from a contract which a private party or the constable had with the Commonwealth or a state agency. Under those circumstances, the probation officer would have a direct financial interest in the arrangement with the Commonwealth or the state agency in question.

For example, if a constable who is also a full-time state employee is asked to serve process for the Attorney General's Office, he will have a financial interest in a contract made by a state agency, thus implicating § 7. The only exemption available to him is § 7(b). In order to be able to use that exemption, the constable needs to comply with the following requirements. First, he may not be employed by the contracting agency (in this example, the Attorney General's office) or an agency that regulates the activities of the contracting agency. Second, he may not participate in or have official responsibility<sup>19</sup> for any of the activities of the contracting agency. Third, the contract must be made after public notice<sup>20</sup> or competitive bidding. Fourth, he must file a statement making full disclosure of his interest in the contract with the Commission. Fifth, the services must be provided outside his normal working hours as a state employee. Sixth, his services may not be required as part of his regular state employee duties. Seventh, he may not be compensated for such services for more than five hundred hours during a calendar year. Finally, the head of the contracting agency must

make and file with the Commission a written certification that no employee of that agency is available to perform the services as part of their regular duties.

If a state employee who is also a constable complies with all of the requirements of § 7(b), he may use that exemption to perform constable services for the state or a state agency. If *any* of the requirements of § 7(b) are not met, however, he may not use the exemption and therefore, may not do the work.

### Other sections

As noted above, §§ 6, 17, 19 and 23 of the conflict-of-interest law also govern the conduct of a state employee also serving as a constable.<sup>21</sup> Under § 6, a probation officer may not participate as such in a particular matter in which the town which appoints him constable has a financial interest. Under § 17, the municipal counterpart to § 4, the constable should not represent or accept compensation from third parties, including the Commonwealth, in connection with particular matters in which the town which appoints him has a financial interest or is a party. Under § 19, the constable should not serve process for, among others, an immediate family member or an organization with whom he is negotiating for prospective employment. Finally, under § 23 the probation officer must refrain from using state resources to conduct his constable work, or using his status as a probation officer to solicit clients.

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<sup>1</sup> “State employee” means in relevant part “a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis.” G.L. c. 268A, § 1(q).

<sup>2</sup> “Municipal employee” means in relevant part “a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis.” G.L. c. 268A, § 1(g). All constables are municipal employees. See G.L. c. 41, §§ 91–95.

<sup>3</sup> EC-COI-85-41. See *also* EC-COI-86-8 (providing examples of the “broad range of statutory powers” afforded to constables).

<sup>4</sup> The Commission notes that conflict-of-interest issues would also be raised by state employees serving process as deputy sheriffs. If those deputy sheriffs were county government employees, the arrangement would raise issues under §§ 4, 7, 11, 13 and 23. If the deputy sheriffs were state employees, the arrangement would raise issues under §§ 7 and 23. This opinion is, however, necessarily limited to the facts put to the Commission by the requester.

<sup>5</sup> “Particular matter” means “any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.” G.L. c. 268A, § 1(k).

<sup>6</sup> Section 4(c) prohibits a state employee from “otherwise than in the proper discharge of his official

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duties, act[ing] as agent or attorney for anyone other than the Commonwealth or a state agency for prosecuting any claim against the Commonwealth or a state agency, or act[ing] as agent or attorney for anyone in connection with any particular matter in which the Commonwealth or a state agency is a party or has a direct and substantial interest.” The Commission has previously considered an official to be acting as an agent when he “speaks or acts on behalf of another in a representational capacity...[such as] submitting an application or other document to the government for another, or serving as another’s spokesperson.” EC-COI-92-25. The Commission has held that a constable’s service of process on private parties does not make the constable an “agent” of the party for whom he serves process. EC-COI-94-4. We do not disturb that holding today.

<sup>7</sup> EC-COI-82-176.

<sup>8</sup> *Commonwealth v. Canon*, 373 Mass. 494 , 504 (1977). See also *Edgartown v. State Ethics Comm’n*, 391 Mass. 83, 89 (1984) (Legislature’s concern about conflicts between public duties and private interests “may reasonably have motivated it to prohibit involvements that might present potential for such conflicts”).

<sup>9</sup> “[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975).

<sup>10</sup> EC-COI-89-31; 88-1; 82-31.

<sup>11</sup> EC-COI-82-33.

<sup>12</sup> “By law” has been interpreted by the Commission to mean authorized by state statutes or regulations, or municipal ordinances or bylaws. EC-COI-92-4 (state); EC-COI-92-10 (municipal).

<sup>13</sup> See footnote 7. See also EC-COI-96-1.

<sup>14</sup> 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.26, at 334 (6th ed. 2000).

<sup>15</sup> *Id.* at 333.

<sup>16</sup> *Casa Loma, Inc. v. Alcoholic Beverages Control Comm’n*, 377 Mass. 231, 234 (1979).

<sup>17</sup> The Commission notes that EC-COI-94-4 relied on an opinion of § 4(a) – EC-COI-84-143 – that the Commission then declined to follow in *In re Quinn*, 1986 SEC 265 (bail commissioner ordered to cease and desist accepting fees in violation of § 7).

<sup>18</sup> EC-COI-92-22.

<sup>19</sup> “Official responsibility” means “the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.” G.L. c. 268A, § 1(i).

<sup>20</sup> “The term ‘public notice’ is not defined in the conflict law. However, we have previously interpreted this term to require advertisement of the position ‘in a newspaper of general circulation.’” EC-COI-95-7 (quoting EC-COI-87-24).

<sup>21</sup> A concise discussion of the application of §§ 6, 17 and 23 to a state employee serving in a municipal capacity can be found in EC-COI-92-25. EC-COI-85-41 contains a detailed discussion of § 23’s application to probation officers serving as constables.